Filed 10/2/03 In re Dylan L. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re DYLAN L., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. ELIZABETH J., Defendant and Appellant.	D042168 (Super. Ct. No. J506463)

APPEAL from a judgment of the Superior Court of San Diego County, Michael J. Imhoff, Referee. Reversed with directions.

Elizabeth J. appeals the judgment terminating her parental rights to her son, Dylan L., under Welfare and Institutions Code section 366.26.[1] She contends the judgment must be reversed because the San Diego County Health and Human Services Agency (the Agency) did not properly serve the Bureau of Indian Affairs (the BIA) with notice that Dylan might be an Indian child under the Indian Child Welfare Act (the ICWA). She also asserts the court erred in finding she did not have a beneficial relationship with Dylan within the meaning of section 366.26, subdivision (c)(1)(A). Because we conclude the record does not support a finding that notice was properly given under the ICWA, we reverse the judgment and direct the court to effect proper service.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2002, the Agency removed 10-day-old Dylan from Elizabeth's custody and filed a section 300 petition on his behalf because Elizabeth's significant mental illness prevented her from caring for him and she had no stable housing or income and had been the victim of domestic violence perpetrated by Dylan's father, Guillermo L. At the May 2002 detention hearing, the court found the ICWA might apply and ordered the Agency to provide notice to the BIA and the Blackfoot and Apache Indian tribes about the proceedings because of Elizabeth's possible Indian heritage. The notices were not filed with the court. In May, however, the BIA returned the notice because the Agency supplied it with insufficient identifying tribal information. In July, the court made a true finding on the petition and found the ICWA did not apply.

---

1 All statutory references are to the Welfare and Institutions Code, unless otherwise

In August 2002, the court found Guillermo was Dylan's biological father. However, although Guillermo filed a paternity inquiry indicating he had Blackfoot and Apache Indian heritage, there is no evidence the Agency sent notice to the BIA or the Blackfoot or Apache tribes based on that information.

In October 2002, the court found Dylan was a dependent of the juvenile court, but declined to order reunification services for either parent and scheduled a section 366.26 hearing.[2] At the May 2003 section 366.26 hearing, the court found Dylan was adoptable. Finding none of the section 366.26, subdivision (c)(1) exceptions applied, the court terminated parental rights.

DISCUSSION

I

Elizabeth asserts the judgment must be reversed because the Agency did not serve proper notice on the BIA or the Apache or Blackfoot tribes.

Congress enacted the ICWA in 1978 to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." (25 U.S.C. § 1902.) It allows a tribe to intervene in state court dependency proceedings (25 U.S.C. § 1911(c)) because the "ICWA presumes it is in the best interests of the child to

---

specified.

[2] The court did not offer Elizabeth reunification services under section 361.5, subdivisions (b)(10) and (11) because 10 of her other children had been adopted as a result of dependency proceedings. The court did not offer Guillermo reunification services under section 361.5, subdivision (a) because doing so would not benefit Dylan as Guillermo had a mental incapacity that rendered him unable to care for a child.

retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource." (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.)

"[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings, and their right of intervention." (25 U.S.C. § 1912(a).) Notice to the tribe provides it the opportunity to exercise its right to intervene. (*In re Junious M.* (1983) 144 Cal.App.3d 786, 790-791.) "Notice shall be sent whenever there is reason to believe the child may be an Indian child, and for every hearing thereafter unless and until it is determined that the child is not an Indian child." (Cal. Rules of Court, rule 1439(f)(5).) No proceeding to terminate parental rights may occur until 10 days after the tribe has received the notice. (25 U.S.C. § 1912(a).) We may void the judgment terminating parental rights if notice to the tribes or BIA is not given in accordance of provisions of the ICWA. (25 U.S.C. § 1914.)

Elizabeth admits the Agency needed to serve only the BIA, because she had not identified the individual tribe to which she belonged. (*In re Edward H.* (2002) 100 Cal.App.4th 1, 4.) However, citing *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739-740, footnote 4, she asserts the judgment must be reversed because the Agency had to, but did not, provide the juvenile court with a copy of the notice sent and the return receipt. Following *Marinna J.*, other courts have held the failure to provide the return receipts and notices is reversible error because the courts were unable to evaluate whether

the forms were adequate. (*In re Asia L.* (2003) 107 Cal.App.4th 498, 508, 509; *In re H. A.* (2002) 103 Cal.App.4th 1206, 1214-1215; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 702-703.)

However, two years after the Third District Court of Appeal decided *Marinna J.*, it decided *In re L. B.* (2003) 110 Cal.App.4th 1420, in which it stated that although providing the return receipts and the notices to the court would be a sound practice and would avoid appellate complaints about notice under the ICWA, neither the ICWA nor the California Rules of Court requires the Agency to do so. (*In re L. B.*, *supra*, 110 Cal.App.4th at p. 1425, fn. 3; see also *In re Levi U.* (2000) 78 Cal.App.4th 191, 195, 199.) Instead, the social worker's statement that he or she sent the notice, which contained the necessary information, is sufficient evidence showing notice has been properly given, unless documentary evidence shows to the contrary. (*In re L. B.*, *supra*, 110 Cal.App.4th at p. 1425; *In re Levi U.*, *supra*, 78 Cal.App.4th at p. 198.)

Here, the social worker made no statement about the notice sent or its contents. The only evidence the notice was sent was the response from the BIA, stating the Agency provided it with insufficient information to determine whether Dylan was an Indian child. The Agency acknowledges the evidence about the specifics of the notice is minimal, but, citing to *In re L. B.*, *supra*, 110 Cal.App.4th at page 1425, argues it is sufficient in the absence of any evidence it was not. However, unlike *In re L. B.*, where details about the notice were known, here the record is silent. Thus, we decline to apply the presumption in *In re L. B.* that the social worker properly performed her duty.

Further, when the Agency receives new information about a child's possible Indian heritage, it has a duty to send new notice to the BIA. (See, e.g., *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254-255.) Thus, the Agency had to send new notice after Guillermo was declared a biological father, because he also indicated he had Blackfoot and Apache heritage.[3] As the record does not indicate that each parent's possible Indian heritage was provided to the BIA or the appropriate tribes, we cannot conclude proper notice was sent under the ICWA. Consequently, we reverse the judgment terminating parental rights and remand for proper notice.[4] Because we reverse, we need not reach Elizabeth's argument that the court had no jurisdiction to proceed with the hearing to terminate parental rights.[5]

---

[3] The Agency states the original notice was sufficient because the information from Elizabeth was that Dylan might have Blackfoot or Apache heritage, the same tribes identified by Guillermo. However, because Elizabeth said Guillermo had no Indian heritage, we infer the notice sent contained no information about his possible Indian heritage. Because the record does not show the notice provided information about Guillermo's heritage, the Agency was obligated to send new notice.

[4] Although Guillermo has not appealed, because we may not terminate the parental rights of only one parent in a Welfare and Institutions Code proceeding except in circumstances not applicable here (Cal. Rules of Court, rule 1463(g)), we also reverse the judgment terminating his parental rights.

[5] Elizabeth, citing to California Rules of Court, rule 1439(e), asserts the court had to proceed under the heightened pleading and proof standards of the ICWA until it received notice from the tribes that Dylan was not an Indian child. However, when the dependency petition indicates the child is not an Indian child, as this one did, the Agency need only provide notice to the BIA and make further inquiry about the child's background and has no duty to apply the heightened pleading and proof standards. (Cal. Rules of Court, rule 1439(e).) Further, once the court found Dylan was not an Indian child in early July 2002, it was not obligated to apply the heightened standards of the ICWA.

II

Elizabeth asserts the judgment must be reversed because she established she had a beneficial relationship with Dylan within the meaning of section 366.26, subdivision (c)(1)(A).

A

The issue of sufficiency of the evidence in dependency cases is governed by the same rules that apply to all appeals. If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534.) We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. Rather, we draw all reasonable inferences in support of the findings, view the record most favorably to the juvenile court's order, and affirm the order even if other evidence supports a contrary conclusion. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) The appellant has the burden of showing the finding or order is not supported by substantial evidence. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

B

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it

must select adoption as the permanent plan unless it finds termination would be detrimental to the child under one of five specified exceptions. (§ 366.26, subd. (c)(1).)

The section 366.26, subdivision (c)(1)(A) exception to the adoption preference applies if termination of parental rights would be detrimental to the child because "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

Because the court found Elizabeth regularly visited Dylan, we examine whether she had a beneficial relationship with the child. We have interpreted the phrase "benefit from continuing the relationship" to refer to a "parent-child" relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child . . . . The relationship arises from the day-to-day interaction, companionship and shared experiences. [Citation.]" (*In re Autumn H.*,

supra, 27 Cal.App.4th at p. 575.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. (*Ibid*.; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

There is no evidence Dylan saw Elizabeth in a parental role. At the time of the hearing, he was 12 and one-half months old and had been out of Elizabeth's care for all but his first 10 days. Although he saw her regularly, there is no evidence he had any relationship with her. During visits, he did not look at her face. He "fussed," squirmed, or whined when she held him. He did not want her to pick him up. He was not distressed when she left.

Elizabeth did not act in a parental role during visits. She spoke very little and sometimes did not interact very much with Dylan. She showed a lack of emotional awareness about his needs. She did not bring him toys, tie his shoes, or change his diapers. She did not recognize when he was done feeding. She tickled him while he was drinking, causing him to choke. She did not want to cancel one visit even though Dylan was very ill. During that visit, she asked no questions about his health.

The social worker believed Dylan relied on his foster family, not Elizabeth, despite her regular visits, to meet his needs. He did not have a beneficial relationship with Elizabeth that outweighed the benefits of adoption. Elizabeth introduced no contrary evidence. Substantial evidence supports the trial court's finding that the section 366.26, subdivision (c)(1)(A) exception did not apply.

DISPOSITION

The court's judgment terminating Elizabeth's and Guillermo's parental rights is reversed and the court is directed to comply with the notice provisions of the ICWA. If after proper notice and inquiry, a tribe does not intervene, the judgment shall be reinstated. (See *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111-112.)

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.